

# Proposed Revisions to the Endangered Species Act (ESA) 4(d) Rule for the African Elephant

## Questions and Answers

The U.S. Fish and Wildlife Service (Service) published a proposal to revise the African elephant rule under section 4(d) of the ESA [50 CFR 17.40 (e)] on July 29, 2015. To view a PDF of the proposed rule, click [here](#). To provide comments, please go to the Federal eRulemaking Portal at <http://www.regulations.gov/>. In the search box, enter FWS-HQ-IA-2013-0091 (the docket number for this proposed rule). You may submit a comment by clicking on “Comment Now!” The Service will review and consider all comments received by September 28, 2015 before publishing a final rule.

### Why is the Service taking this action?

President Obama issued [Executive Order 13648](#) on July 1, 2013, committing the United States to step up its efforts to combat wildlife trafficking. As stated in the President’s Executive Order, wildlife trafficking reduces the economic, social and environmental benefits of wildlife while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability and undermining security. It is in the national interest of the United States to combat wildlife trafficking and ensure we are not contributing to the growing global demand for elephant ivory.

Given the unparalleled and escalating threats to African elephants, we believe a near-complete ban on commercial trade in elephant ivory is the best way to ensure U.S. domestic markets do not contribute to the decline of this species in the wild.

### What is the U.S. role in illegal elephant ivory trade?

The United States is among the world’s largest consumers of wildlife, both legal and illegal. As with any black market trade, it is difficult to determine the exact market value or rank the U.S. role in comparison to other nations. However, we are a significant ivory market, and we must continue to be vigilant in combating illegal ivory trade. By effectively controlling illegal ivory trade at home and assisting elephant range states and consumer countries around the world; we can have a significant impact on elephant conservation.

Our current laws and regulations focus on controlling import and export while allowing some ivory trade within the United States. In 1989, a moratorium on ivory imports was put in place through the African Elephant Conservation Act (AfECA). Although there is legal domestic trade in antiques and other legally acquired ivory imported prior to the 1989 AfECA ivory import moratorium, we believe a substantial amount of elephant ivory continues to be illegally imported and enter the domestic market. Ivory sold in the United States typically includes worked items such as carvings and components of larger finished products such as knife handles, billiard cues and furniture. Ivory is sold in retail shops as well as through online sellers. It is extremely difficult to differentiate legally acquired ivory from ivory derived from elephant poaching. Our criminal investigations and anti-smuggling efforts have clearly shown legal ivory trade can serve as a cover for illegal trade. As just one example, Service and state officers seized more than \$2million -worth of illegal elephant ivory from two New York City retail stores in 2012.

### Why not impose a complete ban on all import, export and domestic sale?

We believe the actions and criteria outlined in the proposed rule will ensure the United States is not contributing to the poaching and illegal trade crisis. In addition, there are certain activities that would be precluded by a complete ban that we believe would benefit the conservation of elephants or do not contribute to poaching and illegal trade. These activities include the movement of ivory for law enforcement and bona fide scientific purposes, and the noncommercial movement of certain items, such as museum specimens and musical instruments containing antique ivory or ivory removed from the wild prior to the listing of African elephants under the Convention on International Trade in Endangered Species (CITES). Prohibiting such activities would not benefit elephant conservation.

The ESA explicitly exempts [antiques](#) from ESA prohibitions and allows certain activities with the issuance of an [ESA permit](#). The antiques exemption applies to all ESA species, including both African and Asian elephants.

## How would proposed changes to the African elephant 4(d) rule affect trade in African elephant ivory?

Please note this table is only for guidance on proposed revisions to the existing Endangered Species Act 4(d) rule for the African elephant. These provisions would not go into effect until we have considered input received during the public comment period and have published a final rule in the *Federal Register*. If you are interested in current requirements for activities undertaken with elephant ivory, please refer to our Ivory Trade Questions and Answers [webpage](#) for a comprehensive review of the actions taken to date.

This table does not include information on state laws. Check with your [state](#) to determine their requirements. Additionally, all imports and exports must be accompanied by appropriate CITES documents and meet other Service import/export requirements.

	What activities are currently allowed/prohibited?	What are the proposed changes?
<b>Administrative Action</b>	<p>In 2014 and 2015, the Service revised <a href="#">Director's Order 210</a> (effective July 31, 2015) and <a href="#">U.S. CITES implementing regulations</a> [50 CFR part 23] (effective June 26, 2014).</p> <p>Both of these actions created new rules for trade in elephant ivory.</p>	<p>We have published a proposal to revise the African elephant rule under section 4(d) of the ESA [50 CFR 17.40 (e)]. This proposed rule is open for public comment until September 28, 2015. To view a PDF of the proposed rule, click <a href="#">here</a>. To provide comments, please go to the Federal eRulemaking Portal at <a href="http://www.regulations.gov/">http://www.regulations.gov/</a>. In the search box, enter FWS-HQ-IA-2013-0091 (the docket number for this proposed rule). You may submit a comment by clicking on "Comment Now!" The Service will review and consider all comments received by September 28, 2015 before publishing a final rule.</p>
<b>Import</b>	<p><b><u>Commercial</u></b> What's allowed:</p> <ul style="list-style-type: none"> <li>No commercial imports allowed.</li> </ul> <p><b><u>Non-commercial</u></b> What's allowed:</p> <ul style="list-style-type: none"> <li>Sport-hunted trophies (no limit).</li> <li>Law enforcement and bona fide scientific specimens.</li> <li>Worked elephant ivory that was <a href="#">legally acquired</a> and removed from the wild prior to February 26, 1976, and has not been sold since February 25, 2014, and is either: <ul style="list-style-type: none"> <li>Part of a household move or inheritance (<a href="#">read more</a>);</li> <li>Part of a musical instrument</li> </ul> </li> </ul>	<p><b><u>Commercial</u></b> The proposed rule does not include any changes for commercial imports.</p> <p><b><u>Non-commercial</u></b> The proposed rule includes the following changes for non-commercial imports:</p> <ul style="list-style-type: none"> <li>Limits sport-hunted trophies to two per hunter per year.</li> <li>Removes the requirement that worked elephant ivory must not have been sold since February 25, 2014. All other requirements for worked elephant ivory (listed in the previous column) must be met.</li> </ul>

	<p>(<a href="#">read more</a>); or</p> <ul style="list-style-type: none"> <li>○ Part of a traveling exhibition (<a href="#">read more</a>).</li> </ul> <p><b>What's prohibited:</b></p> <p>Worked ivory that does not meet the conditions described above.</p> <ul style="list-style-type: none"> <li>• Raw ivory (except for sport-hunted trophies).</li> </ul>	
Export	<p><b><u>Commercial</u></b></p> <p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• <a href="#">CITES Pre-Convention</a> worked ivory, including <a href="#">antiques</a>.</li> </ul> <p><b>What's prohibited:</b></p> <ul style="list-style-type: none"> <li>• Raw ivory.</li> </ul> <p><b><u>Non-commercial</u></b></p> <p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• Worked ivory.</li> </ul> <p><b>What's prohibited:</b></p> <ul style="list-style-type: none"> <li>• Raw ivory.</li> </ul>	<p><b><u>Commercial</u></b></p> <p>The proposed rule would <b>further restrict</b> commercial exports to only those items that meet the criteria of the <a href="#">ESA antiques exemption</a>.</p> <p><u>Export of raw ivory remains prohibited regardless of age.</u></p> <p><b><u>Non-commercial</u></b></p> <p>The proposed rule would <b>further restrict</b> non-commercial exports to the following categories:</p> <ul style="list-style-type: none"> <li>• Items that meet the criteria of the <a href="#">ESA antiques exemption</a>.</li> <li>• Worked elephant ivory that was <a href="#">legally acquired</a> and removed from the wild prior to February 26, 1976 and is either: <ul style="list-style-type: none"> <li>○ Part of a household move or inheritance (<a href="#">read more</a>);</li> <li>○ Part of a musical instrument (<a href="#">read more</a>); or</li> <li>○ Part of a traveling exhibition (<a href="#">read more</a>).</li> </ul> </li> <li>• Worked ivory that qualifies as <a href="#">pre-Act</a>.</li> <li>• Law enforcement and <i>bona fide</i> scientific specimens.</li> </ul>
<a href="#">Foreign commerce</a>	There are no restrictions on foreign commerce.	<p>The proposed rule includes the following changes for foreign commerce:</p> <ul style="list-style-type: none"> <li>• <b>Restricts</b> foreign commerce to: <ul style="list-style-type: none"> <li>○ items that meet the criteria of the <a href="#">ESA antiques exemption</a>; and</li> <li>○ certain manufactured items that</li> </ul> </li> </ul>

		<p>contain a small (<i>de minimis</i>) amount of ivory.</p> <ul style="list-style-type: none"> <li>• <b>Prohibits</b> foreign commerce in: <ul style="list-style-type: none"> <li>○ sport-hunted trophies; and</li> <li>○ ivory imported/exported as part of a household move or inheritance.</li> </ul> </li> </ul>
<b>Sales across state lines (interstate commerce)</b>	<p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) – [seller must demonstrate].</li> <li>• Ivory imported under a <a href="#">CITES pre-Convention certificate</a> – [seller must demonstrate].</li> </ul>	<p>The proposed rule includes the following changes for interstate commerce:</p> <ul style="list-style-type: none"> <li>• <b>Further restricts</b> interstate commerce to only: <ul style="list-style-type: none"> <li>○ items that meet the criteria of the <a href="#">ESA antiques exemption</a>; and</li> <li>○ certain manufactured items that contain a small (<i>de minimis</i>) amount of ivory.</li> </ul> </li> <li>• <b>Prohibits</b> interstate commerce in <ul style="list-style-type: none"> <li>○ ivory imported under the exceptions for a household move or inheritance, or for law enforcement or genuine scientific purposes; and</li> <li>○ sport-hunted trophies.</li> </ul> </li> </ul>
<b>Sales within a state (intrastate commerce)</b>	<p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) – [seller must demonstrate].</li> <li>• Ivory imported under a <a href="#">CITES pre-Convention certificate</a> – [seller must demonstrate].</li> </ul>	<p>The proposed rule does not include any changes for intrastate commerce.</p>
<b>Non-commercial movement within the United States</b>	<p>Non-commercial use, including interstate and intrastate movement within the United States, of <a href="#">legally acquired</a> ivory is allowed.</p>	<p>The proposed rule does not include any changes for non-commercial movement within the United States.</p>
<b>Personal possession</b>	<p>Possession and non-commercial use of <a href="#">legally acquired</a> ivory is allowed.</p>	<p>The proposed rule does not include any changes for personal possession.</p>

#### What is the *de minimis* exemption?

The proposed rule provides an exemption from prohibitions on selling or offering for sale in interstate and foreign commerce certain manufactured items that contain a small (*de minimis*) amount of ivory that meet the following conditions:

- A. If the item is located in the United States, the ivory must have been imported prior to January 18, 1990, or imported under a [CITES pre-Convention certificate](#) with no limitation on its commercial use.

- B. If the item is located outside of the United States, the ivory must have been [removed from the wild prior to February 26, 1976](#).
- C. The ivory is a fixed component or components of a larger manufactured item and not the primary source of the value of the item.
- D. The ivory is not raw.
- E. The manufactured item is not made wholly or primarily of ivory.
- F. The total weight of the ivory component or components is less than 200 grams.
- G. The item must have been manufactured before the effective date of the final rule.

#### **What is foreign commerce?**

Foreign commerce does not include import or export activities. Foreign commerce is defined in section 3 of the Endangered Species Act and applies to individuals or entities subject to U.S. jurisdiction. The term “foreign commerce” includes, among other things, any transaction—

- A. between persons within one foreign country;
- B. between persons in two or more foreign countries;
- C. between a person within the United States and a person in a foreign country; or
- D. between persons within the United States, where the wildlife in question is moving in any country or countries outside the United States.

#### **What is meant by the ESA antiques exemption?**

An ESA antique is an item that meets all of the following criteria:

To qualify as antique, the importer, exporter or seller must show that the item meets all of these criteria\*:

- A. It is 100 years or older.
- B. It is composed in whole or in part of an ESA-listed species.
- C. It has not been repaired or modified with an ESA-listed species after December 27, 1973.
- D. It is being or was brought in to the United States through a port designated for the import of endangered species antiques.

\*Under Director’s Order 210, as a matter of enforcement discretion, items imported prior to September 22, 1982, and items created in the United States and never imported must comply with elements A, B, and C above, but not element D.

#### **What is a CITES pre-Convention certificate?**

A CITES pre-Convention certificate can be issued for specimens that were taken from the wild before the species was listed under CITES in order to authorize export or re-export, provided certain criteria are met. For the African elephant, the pre-Convention date is February 26, 1976. It is not necessary to apply for a CITES pre-Convention certificate unless the owner seeks authorization to export or re-export an item.

U.S. residents may apply to the Division of Management Authority, Branch of Permits using form 3-200-23, for a CITES pre-Convention Certificate for the purpose of exporting an item from the United States. If you wish to import an item into the United States, this authorization must be obtained from the exporting country. A list of CITES Management Authorities is available on the [CITES Secretariat’s website](#).

A CITES pre-Convention certificate is not issued for the possession, donation or sale of ivory within the United States, however you must meet certain criteria to engage in commercial activities with ivory (see the table above). There is no registration process to assess or certify personally owned ivory, and you do not need a permit from the U.S. Fish and Wildlife Service to possess your legally acquired ivory items. We do recommend that you maintain records and documents showing the provenance of your ivory items.

#### **How is pre-Act defined under the Endangered Species Act?**

Specimens (e.g. elephant ivory, hair or leather) defined as pre-Act may be exempt from standard prohibitions on import or export. To qualify as pre-Act, a specimen must:

- Have been held in captivity or in a controlled environment prior to December 28, 1973, or prior to the date of first listing under the ESA; and
- Such holding or use and any subsequent holding or use was not in the course of a commercial activity.

**The Director's Order refers to worked African elephant ivory that "was legally acquired prior to February 26, 1976." What does that mean?**

February 26, 1976, is the date the African elephant was first listed under CITES (the pre-Convention date). An item that contains African elephant ivory that was removed from the wild prior to February 26, 1976, is considered to be a pre-Convention specimen. This does not mean that the current owner must have purchased or acquired it prior to 1976, but that the item was manufactured from ivory that was taken from the wild prior to 1976. For example, a musical instrument that was manufactured in 1965 using African elephant ivory would be considered a pre-Convention specimen. Likewise, an instrument manufactured in 1985 using ivory acquired by the manufacturer in 1975 would also be considered a pre-Convention specimen. Since it is unlawful to possess specimens that have been traded contrary to CITES or taken in violation of the ESA, the ivory must have been legally acquired.

**What requirements must be met to import African elephant ivory as part of a household move or inheritance?**

African elephant ivory can be imported for personal use as part of a household move or inheritance provided the ivory was removed from the wild before February 26, 1976, and the item is accompanied by a valid [CITES pre-Convention certificate](#). Items are considered part of a household move if they are household effects included when moving your residence to or from the United States provided you own the specimen and are moving it for personal use and you import or export your household effects within 1 year of changing your residence from one country to another. *Currently*, the ivory cannot have been transferred from one person to another person in pursuit of financial gain or profit after February 25, 2014; however, the proposed revisions to the African elephant 4(d) rule would remove this requirement.

**What requirements must be met to import African elephant ivory as part of a musical instrument?**

Worked African elephant ivory can be imported as part of a musical instrument provided that the ivory was [legally acquired](#) before February 26, 1976, and the musical instrument containing elephant ivory is accompanied by a valid CITES musical instrument certificate or an equivalent CITES document that meets the requirements of [CITES Resolution Conf. 16.8](#). *Currently*, the ivory cannot have been transferred from one person to another person in pursuit of financial gain or profit after February 25, 2014; however, the proposed revisions to the African elephant 4(d) rule would remove this requirement. Raw African elephant ivory cannot be imported as part of a musical instrument.

**What requirements must be met to import African elephant ivory as part of a traveling exhibition?**

Worked African elephant ivory may be imported as part of a traveling exhibition, such as a museum or art show, provided the ivory was [legally acquired](#) prior to February 26, 1976, the person or group qualifies for a CITES traveling exhibition certificate, and the item containing elephant ivory is accompanied by a valid CITES traveling exhibition certificate or an equivalent CITES document that meets the requirements of [50 CFR 23.49](#). *Currently*, the ivory cannot have been transferred from one person to another person in pursuit of financial gain or profit after February 25, 2014; however, the proposed revisions to the African elephant 4(d) rule would remove this requirement. Raw African elephant ivory cannot be imported as part of a traveling exhibition.

**What activities with African elephant ivory will not be impacted by the proposed rule?**

There would be no practical impact on the commercial import of African elephant ivory, given the import prohibitions already in place under the African Elephant Conservation Act moratorium and Director's Order 210. Similarly, restrictions on intrastate commerce would remain unchanged under the proposed revisions, since the ESA does not apply to sales within a state. CITES "use-after-import" provisions (in 50 CFR 23.55) would continue to apply to sales within a state. In addition, certain [states](#) have enacted additional restrictions on the trade of ivory within a state. There is nothing in the ESA, this proposed rule, the AfECA, or our CITES regulations that prohibits the possession, donation or noncommercial interstate movement of listed species, including their parts or products, provided they were lawfully acquired. This will not change.

**Example scenarios:**

**I have a violin bow that contains a small amount of ivory. Under the proposed revisions, will I be able to sell the bow in the United States, export it for sale, or take it overseas for a concert?**

If the bow meets the requirements for the [de minimis](#) exception, including that the ivory was removed from the wild prior to February 26, 1976, and that the total weight of the ivory is less than 200 grams you will be able to sell it in the United States.

If the bow qualifies as an [ESA antique](#) you will be able to export it for sale.

If the bow meets the requirements for import/export of a musical instrument, including that the ivory was removed from the wild prior to February 26, 1976, it is accompanied by a CITES musical instrument certificate or equivalent CITES document, the bow is securely marked or uniquely identified, and it will not be sold or otherwise transferred while outside the United States (see paragraph (e)(4) in the proposed rule text for details) you can travel with it internationally for personal use, including to perform in concerts.

**I have an antique ivory figurine. Under the proposed revisions, will I be able to sell it online?**

If it qualifies as an [ESA antique](#), you will be able to sell it under the proposed revisions. However, State laws and online retailer policies may further restrict or prohibit ivory sales. Always consult with your State and the retailer to determine their requirements.

**I have an elephant head with tusks that my father killed in 1949. Will I be able sell it across state lines?**

No. Under the proposed revisions to the African elephant 4(d) rule, you would not be able to sell the tusks. Ivory imported as a sport-hunted trophy that does not meet the criteria for an [ESA antique](#) cannot be sold.